

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NANETTE HUNTER, on behalf of
herself, and all others similarly situated,

Plaintiff,

vs.

FIRST NATIONAL BANK OF
OMAHA, NA,

Defendant.

CASE NO. 15-cv-808-H-NLS

ORDER:

**(1) GRANTING DEFENDANT'S
MOTION TO COMPEL
ARBITRATION; and**

**(2) STAYING ACTION
PENDING ARBITRATION**

[Doc. No. 11]

On April 10, 2015, Plaintiff Nanette Hunter ("Plaintiff"), on behalf of herself and all others similarly situated, filed a complaint against Defendant First National Bank of Omaha, NA ("Defendant"). (Doc. No. 1.) On June 18, 2015, Defendant filed a motion to compel arbitration. (Doc. No. 11.) Plaintiff filed an opposition on July 20, 2015. (Doc. No. 12.) Defendant filed a reply on July 27, 2015. (Doc. No. 14.) On July 28, 2015, the Court submitted the motion on the parties' papers and vacated the hearing. (Doc. No. 16.) For the following reasons, the Court grants the motion to compel arbitration. The Court orders a limited stay of the proceedings.

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Background

2 Plaintiff's dispute arises out of phone calls made by Defendant for the purpose
3 of collecting an alleged debt on a credit card she obtained from Defendant. (Doc. No.
4 1, "Compl."). Plaintiff applied by phone for a credit card from Defendant. (Doc. No.
5 11-2 at ¶ 5; Doc. No. 14-1 at ¶ 5; Doc. No. 14-2 at 5-15.) Plaintiff spoke with Edsel
6 Cruz, a representative of Defendant ("Cruz"). (Doc. No. 14-1 at ¶ 5.) Plaintiff provided
7 information regarding her application for a credit card. (Doc. No. 14-1 at 5-13.) Cruz
8 explained several terms of the application to Plaintiff, including that "[y]ou agree to
9 comply with the card member agreement that will be furnished if your application is
10 approved." (*Id.* at 14 ll. 14-15.) Defendant later mailed monthly billing statements to
11 Plaintiff that included a cardmember agreement. (Doc. No. 11-2, Mayo Declaration,
12 at ¶ 6.)

Defendant attaches a document entitled “Cardmember Agreement” to its motion to compel arbitration. (Doc. No. 11-3.) The first page of the document states that the “booklet describes important terms and conditions that apply to your credit card account.” (*Id.* at 1.) The second page of the agreement contains the following clause: “Using or allowing someone else to use your account means you accept the terms of the Agreement.” (*Id.* at 2.) The subheading “Claims and Arbitration of disputes” appears on the first page of the document under the heading titled “Contents of this Cardmember Agreement.” (*Id.* at 1.) The arbitration clause states, in relevant part:

14. Claims and Arbitration of disputes

Arbitration and Arbitrators or Impartial Arbitrators
Arbitration is a process by which an impartial arbitrator resolves a dispute, instead of a court. This section explains which claims and disputes may be resolved by arbitration and the rules and limitations that apply in arbitration. This section also explains the treatment and limitation of claims.

“CLAIMS” AND RELATED DEFINED TERMS: When this Agreement refers to a “Claim” it means any pre-existing, present or future claim, dispute or controversy that arises from or in any way relates to: (a) this Agreement, any prior Cardmember Agreement, your credit card account, the credit we offer or deny to you in connection with your credit card account, any advertising or application for your credit card account, or the benefits, rewards or other products or services that are offered in connection with your credit card account; or (b) the acts or omissions of you, of us, or of Related Parties if those acts or omissions relate to your

1 credit card account or any benefits, rewards or other products or services
 2 related to your credit card account. Claims include, but are not limited to
 3 claims based on contract and tort (including intentional torts), claims made
 4 in law or in equity, claims based on constitutional, statutory, regulatory
 5 and common law rights, and claims for damages, penalties and injunctive,
 6 declaratory or equitable relief. . . . Any Claim or Claims brought by or on
 7 behalf of a class, brought in a representative capacity or otherwise on a
 8 class basis, or brought in the form of a private attorney general action are
 9 referred to as "Class Proceedings" regardless of whether they are
 10 commenced in court or in arbitration.

11 (Id. at 7-8 [formatting in original].) The arbitration clause further states:

12 **ARBITRATION:**
THIS CONTRACT CONTAINS AN ARBITRATION PROVISION
WHICH MAY BE ENFORCED BY THE PARTIES.
PLEASE READ THE FOLLOWING PARAGRAPHS CAREFULLY.

13 **WITH LIMITED EXCEPTIONS, THIS ARBITRATION**
14 PROVISION ALLOWS EITHER PARTY TO REQUIRE THAT
15 ANY "CLAIM" (AS DEFINED ABOVE) BE RESOLVED BY
BINDING ARBITRATION.

16 **ARBITRATION REPLACES THE RIGHT TO GO TO COURT**
17 AND TO HAVE A CLAIM DETERMINED BY A JURY. OTHER
18 RIGHTS YOU MAY HAVE IN COURT, SUCH AS DISCOVERY
19 OR APPEAL RIGHTS, MAY NOT BE AVAILABLE OR MAY BE
20 MORE LIMITED IN ARBITRATION. EXCEPT AS PROVIDED
21 BELOW, THESE OTHER RIGHTS ARE WAIVED.

22 **YOU WILL NOT BE ABLE TO DO THESE TWO THINGS (IN**
COURT OR IN ARBITRATION): (1) BRING A CLAIM AS A
23 CLASS ACTION OR IN A REPRESENTATIVE CAPACITY; OR (2)
PARTICIPATE IN A CLAIM AS A CLASS MEMBER.

24 Except as provided below: (1) you may unilaterally choose to have any
 25 Claim that we bring against you resolved through binding arbitration; and
 26 (2) we may unilaterally choose to have any Claim that you bring against
 27 us (or us and any of Our Related Parties) resolved through binding
 28 arbitration. . . . **If a party chooses to have a Claim resolved by**
arbitration pursuant to this arbitration provision, neither you nor we
will have the right to litigate that Claim in court, have a jury trial on
that Claim, or engage in pre-arbitration discovery, except as provided
for in the applicable Arbitration Rules of the selected Arbitrator(s)
and as otherwise set forth in this arbitration provision.

29 (Id. at 8.) The arbitration agreement excludes "Ordinary Claims" from compelled
 30 arbitration. The agreement defines "Ordinary Claims" as follows:

31 A Claim will be considered an "Ordinary Claim" if all three of the
 32 following are true: (1) the only remedy being sought for the Claim is
 33 monetary damages; (2) the recovery being sought for the Claim is less than
 34 \$25,000, excluding interest and costs; and (3) the only parties to litigation
 35 to resolve the Claim will be you, us, and/or Related Parties.

1 (Id.) The agreement also contains a class action waiver. (Id.)

2 On April 10, 2015, Plaintiff filed a class action complaint against Defendant,
 3 alleging causes of action for violation of the Telephone Consumer Protection Act
 4 (“TCPA”), 47 U.S.C. §§ 227 et seq. and the California Invasion of Privacy Act
 5 (“CIPA”), California Penal Code §§ 632.7 et seq. (Doc. No. 1.) Plaintiff alleges that
 6 she received unsolicited phone calls to her cellular telephone from a number owned and
 7 operated by Defendant on multiple occasions in early 2015. (Doc. No. 1, Compl. at ¶¶
 8 13-14.) Plaintiff claims that the calls concerned an attempt to collect an alleged debt.
 9 (Id. at ¶ 13.)

10 By the present motion, Defendant moves to dismiss or stay this action and
 11 compel arbitration of Plaintiff’s claims pursuant to an agreement. (Doc. No. 11.) In
 12 response, Plaintiff contends that the arbitration provision in the Cardmember
 13 Agreement is not a valid contract, that her claims are outside the scope of the arbitration
 14 agreement, and that the arbitration agreement is unconscionable. (Doc. No. 12.) For
 15 the following reasons, the Court grants the motion to compel arbitration. The Court
 16 orders a limited stay of the case pending arbitration proceedings.

17 **Discussion**

18 **I. Legal Standards**

19 The Federal Arbitration Act (“FAA”) provides that a written provision in a
 20 “contract evidencing a transaction involving commerce to settle by arbitration a
 21 controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and
 22 enforceable, save upon such grounds as exist at law or in equity for the revocation of
 23 any contract.” 9 U.S.C. § 2. The Supreme Court has explained that the FAA reflects
 24 an “emphatic federal policy in favor of arbitral dispute resolution.” KPMG LLP v.
Cocchi, 132 S. Ct. 23, 25 (2011); see also AT&T Mobility LLC v. Concepcion, 131 S.
 25 Ct. 1740, 1745 (2011) (stating that the FAA reflects a ““liberal federal policy favoring
 26 arbitration agreements.””). Under the FAA, federal courts are required to rigorously
 27 enforce an agreement to arbitrate. See AT&T Mobility, 131 S. Ct. at 1745-46; Perry
 28

1 v. Thomas, 482 U.S. 483, 490 (1987). “By its terms, the [FAA] leaves no place for the
 2 exercise of discretion by a district court, but instead mandates that district courts shall
 3 direct the parties to proceed to arbitration on issues as to which an arbitration agreement
 4 has been signed.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

5 “The court’s role under the Act is . . . limited to determining (1) whether a valid
 6 agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the
 7 dispute at issue.” Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130
 8 (9th Cir. 2000). In determining the existence of an agreement to arbitrate, courts look
 9 to “general state-law principles of contract interpretation, while giving due regard to the
 10 federal policy in favor of arbitration.” Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046,
 11 1049 (9th Cir. 1996); *see also* Rent-A-Center, West, Inc., v. Jackson, 561 U.S. 63, 67
 12 (2010) (“[A]rbitration is a matter of contract.”). In addition, courts resolve any
 13 “ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration.”
 14 Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468,
 15 476 (1989).

16 II. Analysis

17 A. A Valid Agreement to Arbitrate Exists

18 The Court first determines whether a valid agreement to arbitrate exists. Chiron
 19 Corp., 207 F.3d at 1130. Defendant has presented evidence showing that Plaintiff
 20 entered into a credit agreement containing an arbitration clause. Plaintiff applied for
 21 a credit card from Defendant over the phone. (Doc. No. 11-2 at ¶ 5; Doc. No. 14-1 at
 22 ¶ 5; Doc. No. 14-2 at 5-15.) During that phone conversation, Plaintiff provided
 23 information to support her application for the credit card. (Doc. No. 14-1 at 5-13.)
 24 Defendant’s representative highlighted terms of the application and informed Plaintiff
 25 that a condition of receiving the card is that “[she] agree to comply with the card
 26 member agreement that will be furnished if [her] application is approved.” (Id. at 14
 27 ll. 14-15.) Cruz also explained that the exchange of information over the phone
 28 “completes the application process” and that Plaintiff would receive information

1 “regarding the status of [her] application” by mail. (*Id.* at ll. 21-23.)

2 Defendant later mailed monthly billing statements to Plaintiff that included the
 3 cardmember agreement. (Doc. No. 11-2, Mayo Declaration, at ¶ 6.) The agreement
 4 provides that “Using or allowing someone else to use your account means you accept
 5 the terms of the Agreement.” (Doc. No. 11-3 at 2.) Moreover, Defendant provides
 6 evidence that the credit card is affixed to a copy of the cardmember agreement and that
 7 Plaintiff would have to physically remove the card from that agreement to activate the
 8 card. (Doc. No. 14-1, Mayo Declaration, ¶ 7.) The agreement, reproduced in relevant
 9 part above, is clear and unambiguous. Plaintiff’s assertions that she never saw the
 10 agreement are not persuasive.

11 Moreover, the arbitration clause is not unconscionable. California law favors
 12 enforcement of valid arbitration agreements. Armendariz v. Foundation Health
 13 Psychcare Servs., Inc., 24 Cal. 4th 83, 97 (2000). Enforcing the arbitration provisions
 14 under these circumstances is not unconscionable. The cardmember agreement provides
 15 clear notice of its arbitration provisions on the first page of the agreement. (Doc. No.
 16 11-3 at 1.) The arbitration provision itself contains a distinctive, capitalized, bold
 17 statement that under certain circumstances,

18 **ARBITRATION REPLACES THE RIGHT TO GO TO COURT
 AND TO HAVE A CLAIM DETERMINED BY A JURY. OTHER
 RIGHTS YOU MAY HAVE IN COURT, SUCH AS DISCOVERY
 OR APPEAL RIGHTS, MAY NOT BE AVAILABLE OR MAY BE
 MORE LIMITED IN ARBITRATION. EXCEPT AS PROVIDED
 BELOW, THESE OTHER RIGHTS ARE WAIVED.**

21 (*Id.* at 8 [formatting in original].)

22 Furthermore, this is a case where the plaintiff attempts to use class action claims
 23 under the TCPA to challenge a company’s debt collection phone calls. This is not a
 24 situation where a defendant might be using an arbitration provision to defend fraud or
 25 other actions intended to cheat consumers out of individually small claims. Under these
 26 circumstances, having weighed the competing public policies at issue, the Court
 27 concludes that Plaintiff has not met her burden, and it will not disturb the terms of the
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1 agreement. See Higgins v. Superior Court, 140 Cal. App. 4th 1238, 1249 (2006)
 2 (imposing burden of proving unconscionability on party opposing arbitration).
 3 Accordingly, the Court concludes that a valid agreement to arbitrate exists.

4 **B. The Agreement Encompasses the Dispute At Issue**

5 Because “arbitration is a matter of contract,” United Steelworkers of Am., 363
 6 U.S. at 582, the Court next determines “whether the agreement encompasses the dispute
 7 at issue.” Chiron Corp., 207 F.3d at 1130. “[A]ny doubts concerning the scope of
 8 arbitrable issues should be resolved in favor of arbitration.” Moses, 460 U.S. at 24-25.
 9 The arbitration provision in the cardmember agreement provides that the following
 10 claims are subject to arbitration:

11 [A]ny pre-existing, present or future claim, dispute or controversy that
 12 arises from or in any way relates to: (a) this Agreement, any prior
 13 Cardmember Agreement, your credit card account, the credit we offer or
 14 deny to you in connection with your credit card account, any advertising
 15 or application for your credit card account, or the benefits, rewards or
 16 other products or services that are offered in connection with your credit
 17 card account; or (b) the acts or omissions of you, of us, or of Related
 18 Parties if those acts or omissions relate to your credit card account or any
 19 benefits, rewards or other products or services related to your credit card
 20 account.

21 (Doc. No. 11-3 at 7-8.) Plaintiff’s complaint arises out of phone calls to her cellular
 22 telephone by Defendant concerning an attempt to collect an alleged debt owed on the
 23 credit card she obtained from Defendant. (See Doc. No. 1, Compl.) Defendant’s phone
 24 calls regarding the debt allegedly owed on Plaintiff’s credit card are “acts” that “relate
 25 to [Plaintiff’s] credit card account.” (See Doc. No. 11-3 at 7-8.) Accordingly, on the
 26 record before the Court and in light of the presumption in favor of arbitration, Plaintiff’s
 27 claims fall within the scope of the arbitration clause.

28 Plaintiff argues that her claims are not subject to arbitration because they fall
 29 within the exception for “Ordinary Claims.” (Doc. No. 12 at 11-12.) The arbitration
 30 provision in the cardmember agreement excludes “Ordinary Claims” from compelled
 31 arbitration. (Doc. No. 11-3 at 8.) The agreement defines “Ordinary Claims” as
 32 follows:

1 A Claim will be considered an “Ordinary Claim” if all three of the
 2 following are true: (1) the only remedy being sought for the Claim is
 3 monetary damages; (2) the recovery being sought for the Claim is less than
 4 \$25,000, excluding interest and costs; and (3) the only parties to litigation
 5 to resolve the Claim will be you, us, and/or Related Parties.

6 (Id.) Under the agreement, a court may determine whether a claim is an Ordinary
 7 Claim. (Id. at 9.) Here, Plaintiff alleges that she seeks “damages, injunctive relief, and
 8 any other available legal or equitable remedies” against Defendant for alleged violations
 9 of the TCPA and CIPA. (Doc. No. 1, Compl. at ¶ 1.) Plaintiff later repeats that she
 10 seeks “damages and injunctive relief for recovery of economic injury” (Id. at ¶
 11 32.) And Plaintiff specifically seeks “statutory damages . . . and injunctive relief” for
 12 the alleged CIPA violations. (Id. at ¶ 41.) The arbitration clause is unambiguous in its
 13 definition of an Ordinary Claim; to qualify under the Ordinary Claim exception, the
 14 plaintiff must seek only monetary damages. (Doc. No. 11-3 at 8.) But Plaintiff seeks
 15 injunctive relief in addition to monetary damages. And Plaintiff is “the master of [her]
 16 complaint.” Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1106 (9th
 Cir. 2000). Accordingly, Plaintiff’s claim is not expressly excluded by the arbitration
 agreement.

17 Plaintiff also contends that her claims under the TCPA are not arbitrable. (Doc.
 18 No. 12 at 12-20.) Plaintiff’s claims for violations of the TCPA are based on allegations
 19 that Defendant repeatedly called Plaintiff in an effort to collect on a past-due balance.
 20 (Doc. No. 1, Compl. ¶¶ 13-14.) The arbitration clause includes “claims based on
 21 contract and tort (including intentional torts)” and “claims based on constitutional,
 22 statutory, regulatory and common law rights.” (Doc. No. 11-3 at 8.) On the facts
 23 before the Court, Plaintiff’s TCPA claims are subject to the arbitration provision
 24 contained in the credit agreement. See, e.g., McNamara v. Royal Bank of Scot. Group,
 25 PLC, 2012 U.S. Dist. LEXIS 158580 (S.D. Cal. Nov. 5, 2012) (finding plaintiff’s
 26 claims for violation of the TCPA were subject to arbitration based on an arbitration
 27 provision contained in a Credit Card Agreement); Knutson v. Sirius XM Radio Inc.,
 28 2012 U.S. Dist. LEXIS 75698 (S.D. Cal. May 31, 2012) (finding plaintiff’s claims for

1 violation of the TCPA were subject to arbitration based on an arbitration provision
2 contained in a Customer Agreement).

Conclusion

4 For the foregoing reasons, the Court grants Defendant's motion to compel
5 arbitration. The parties must proceed with Plaintiff's claims via arbitration in
6 accordance with the terms of the agreement. The Court stays this action for six months,
7 at which time the Court may inquire into the status of the arbitration. The Court
8 reserves the right to dismiss the action.

IT IS SO ORDERED.

10 | DATED: July 31, 2015

Marilyn L. Huff
MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT